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ABSTRACT

The Assistant Attorney-General for Civil Rights argues that preferential treatment to individuals based on their race cannot be justified under the law. Reynolds reviews the drafting of the Constitution and notes that the Constitution wronged blacks when it accorded them a fractional status of free persons. The doctrine of "separate-but-equal" dictated public policy for over fifty years until it was struck down by the Supreme Court as unconstitutional in the 1954 "Brown vs. Board of Education" decision, he observes. The "Brown" decision and subsequent legislation such as the Civil Rights Acts of 1957, 1960, 1964, and 1968, and the Voting Rights Act of 1965, Reynolds suggests, were intended by Congress to be colorblind. Thus, he contends, it is the Reagan administration policy to enforce the civil rights laws to their maximum extent and to consider "affirmative action" to be discriminatory if it bestows advantage on members of a particular group. An alternative policy to racial quotas in educational and employment situations would be to evaluate people of all races on the basis of their qualifications, Reynolds suggests. (AOS)

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FOURTH ANNUAL HOUSTON LECTURE

BY

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FORUM ON LAW AND SOCIAL JUSTICE
"RACE RELATIONS IN CONTEMPORARY AMERICA"

AT

AMHERST COLLEGE
AMHERST, MASSACHUSETTS
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Legitimizing Race as a Decision-Making Criterion: Where Are We Going?

I am pleased to have this opportunity to speak to you this afternoon -- particularly on so critically important a subject as "Legitimizing Race as a Decision-Making Criterion: Where Are We Going?" Since I doubt that my views in this area are entirely unknown, I can, without divulging any secrets, set the proper tone of my remarks from the beginning by observing that, if history has taught any lesson at all, it is that the use of race to justify treating individuals differently -- whether they be black or white -- can never be legitimate. Regrettably, we have too often disregarded that admonition, always with predictably dire consequences. Thus, before we think together about what the future holds, a glance backward is necessary in order to frame the debate properly.

The United States was founded at a time when human beings were bought and sold, and the documents announcing our Nation's formation and constituting its government are stained by their acceptance of that unspeakable wrong. The Declaration of Independence proclaimed that all men are created equal; yet those who so boldly etched that principle into the fabric of American life, continued their unabashed acceptance of slavery. The United States Constitution, as originally ratified, accorded to black slaves a fractional status of

that of free persons, and granted them none of the rights associated with citizenship -- an injustice sustained by the Supreme Court in the infamous Dred Scott decision. 60 U.S. (19 How.) 393 (1857). Indeed, race served as a basis on which legal rights were measured, status determined, opportunities allocated, and freedom accorded from the beginning of the Republic until the 1860's, when the inequities of slavery could no longer be tolerated.

The Nation emerged from the Civil War with the Thirteenth, Fourteenth, and Fifteenth Amendments, which abolished slavery, guaranteed to all citizens equal protection under the law, and protected the right to vote from racial discrimination. The Framers of those Amendments intended to outlaw all official classifications based on race. As Senator Jacob Howard said in 1866 during debate on the Fourteenth Amendment, the Equal Protection Clause "abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another."

The Supreme Court, however, initially saw the amendments differently. "[I]n the nature of things," said the Court in Plessy v. Ferguson, 163 U.S. 537, 544 (1896), the Fourteenth Amendment "could not have been intended to abolish distinctions based on color . . . ." Thus, the Court ruled that Mr. Plessy, who was one-eighth black, could be excluded by law from a railroad car reserved for whites.

A lone voice, the elder Justice Harlan's, decried the Court's "conclusion that it is competent for a State to regulate the enjoyment by citizens of their civil rights solely upon the basis of race." Id. at 559. Insisting that the Civil Rights Amendments had "removed the race line from our governmental systems" (id. at 555), Justice Harlan declared: "Our Constitution is color-blind and neither knows nor tolerates classes among citizens. . . . The law regards man as man, and takes no account of his surroundings or of his color . . . ." Id. at 559.

Nonetheless, the separate-but-equal doctrine held sway in America for over half a century, a period in which many State and local governments regulated the enjoyment of virtually every public benefit -- from attendance in public schools to the use of public restrooms -- on the basis of race. Some fifty years after the Plessy decision, Justice Jackson wrote in 1944 that once the principle of governmental race-consciousness is validated, it "lies about like a loaded weapon ready for the hand of any authority that can bring forth a plausible claim of an urgent need." The majority ignored Jackson's warning, however, ruling in Korematsu v. United States, 323 U.S. 214 (1944), that the Federal Government was constitutionally authorized to exclude U.S. citizens of Japanese ancestry from certain areas in California. It took another ten years before the patent injustice of governmental allocation of benefits along racial lines ultimately -- indeed inevitably -- brought the Supreme Court in the early 1950's

to its finest hour: the case of Brown v. Board of Education, 349 U.S. 294 (1954).

In Brown, the Supreme Court finally laid to rest the separate-but-equal doctrine. The Court acknowledged with eloquent simplicity the primacy of the constitutional right at issue: "At stake," declared Chief Justice Warren for a unanimous Court, "is the personal interest of the plaintiffs in admission to public schools . . . on a [racially] nondiscriminatory basis." Brown v. Board of Education, 349 U.S. 294, 300 (1954). Race consciousness as a tool for assigning school children was flatly and unequivocally condemned.

This judicial insistence on colorblindness in our public school systems was precisely the conclusion urged by the school children's attorney, Thurgood Marshall. Expressly rejecting the notion that the Constitution would require the establishment of "non-segregated school[s]" through race-conscious student reassignments, Mr. Marshall argued to the Court that: "The only thing that we ask for is that the State-imposed racial segregation be taken off, and to leave the county school board, the county people, the district people, to work out their own solution of the problem, to assign children on any reasonable basis they want to assign them on." So long as the children are assigned "without regard to race or color, . . . nobody," argued Mr. Marshall, "would have any complaint."

The Brown decision spurred a judicial and legislative quest to condemn racial discrimination, both public and private, in virtually every aspect of American life. During the next decade, the Supreme Court consistently denounced racial distinctions as being, in Chief Justice Stone's words, "by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." Loving v. Virginia, 388 U.S. 1, 11 (1966), quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943).

Indeed, in 1964 the Court prohibited even mere governmental encouragement of private "race-conscious[ness]" in Anderson v. Martin, 375 U.S. 399 (1964), a case involving a State statute requiring that the race of each candidate for public office be accurately designated on each ballot. Noting that any governmental encouragement of racial bloc voting would tend to favor the race having a numerical majority, the Court held that the State could not constitutionally encourage racial discrimination of any kind, whether it worked to the disadvantage of blacks or whites. The State's designation of a candidate's race was, according to a unanimous Court, of "no relevance" in the electoral process. Id. at 402-03.

This judicial insistence on race neutrality was paralleled in the Congress, which enacted the Civil Rights Acts of 1957, 1960 and 1964, the Voting Rights Act of 1965, and the Civil Rights Act of 1968. That Congress intended these enactments to

establish a standard blind to color distinctions is compelled by both the statutes' language and their legislative histories.

Indeed, the issue of racial preferences was confronted directly in the debates preceding passage of the Civil Rights Act of 1964. For example, the proponents of Title VII -- which prohibits discrimination in employment -- uniformly and unequivocally denied claims by the bill's opponents that the measure would countenance race-conscious preferences. Hiring preferences favoring black employees would violate Title VII "just as much as a 'white only' employment policy," observed Senator Williams. "[H]ow can the language of equality," he asked those arguing the case for racial preference, "favor one race or one religion over another? Equality can have only one meaning, and that meaning is self-evident to reasonable men. Those who say that equality means favoritism do violence to common sense." 110 Cong. Rec. 8921 (1964). Senator Muskie, another key supporter of the 1964 Act, expressed a similar understanding of the legislation: "Every American citizen," said Muskie, "has the right to equal treatment -- not favored treatment, not complete individual equality -- just equal treatment." Id. at 12614.

Senator Humphrey agreed. The principal force behind passage of the 1964 Act in the Senate, Senator Humphrey repeatedly stated that Title VII would prohibit any consideration of race in employment matters, using on one occasion these words:

> The title does not provide that any preferential treatment in employment shall be

> given to Negroes or to any other persons or groups. It does not provide that any quota systems may be established to maintain racial balance in employment. In fact, the title would prohibit preferential treatment for any particular group, and any person, whether or not a member of any minority group, would be permitted to file a complaint of discriminatory employment practices. Id. at 11848.

Indeed, at another point, Senator Humphrey's exasperation with the opposition's argument prompted him to make the following offer: "If . . . in title VII . . . any language [can be found] which provides that an employer will have to hire on the basis of percentage or quota related to color . . . I will start eating the pages [of the bill] one after another . . . ." Id. at 7420.

Similarly, in the area of school desegregation the 1964 Congress took special precautions to ensure that Title IV of the same Act was equally sensitive to the theme of race neutrality. This was reflected in two separate sections: Section 2000c(b)1A plainly states that "'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance;" the point is made even more explicitly in Section 2000c-6, which stresses that the Act does not "empower any official or court of the United States to issue any order seeking to achieve a racial balance . . . ." Nor did Congress rest there. The 1974 Equal Educational Opportunities Act includes Congressional findings regarding the counterproductive nature of excessive busing to achieve classroom ratios based on race (20 U.S.C. §1702), places limitations on the authority of courts to order

such relief (20 U.S.C. §1714), and expresses a strong preference for other remedies -- such as neighborhood schools with neutrally drawn zones, transfer programs, magnet schools and new construction (20 U.S.C. §1713) -- which better combine the objectives of desegregation and educational enhancement.

These judicial and legislative pronouncements reflected a national consensus that racial classifications are wrong -- morally wrong -- and ought not to be tolerated in any form or for any reason. Spokesmen both within and outside of Government advanced the principle, but its true essence was best captured, in my judgment, by Dr. Martin Luther King, Jr., when he dreamed aloud in the summer of 1963 of a Nation in which his children would "not be judged by the color of their skin, but by the content of their character."

That dream began to fade in the 1970's when the quest for equality of opportunity gradually evolved into an insistence upon equality of results. The concept of racial neutrality blurred into the concept of racial balance, on the representation that the former could not be fully realized unless the latter was achieved. Our constitutional ideal of color-blindness -- so recently rescued from the separate-but-equal era and so ardently defended during the civil rights advances of the 1950's and 1960's -- yielded yet again to the race-conscious thinking of an earlier day. Although the argument this time was grounded

on the noblest of intentions, its premise was equally flawed and the consequences no more tolerable.

For those advancing this new thesis, numerical parity became the watchword for equal opportunity. Regulation and allocation by race are not wrong per se was the claim; rather, they depend for validity upon who is being regulated, on what is being allocated and on the purpose of the arrangement. If a racial preference will achieve the desired statistical result, its discriminatory feature can be tolerated, we were told, as an unfortunate but necessary consequence of remedying "the effects of past discrimination."

Thus, we come full circle: fighting discrimination with discrimination, or -- to put the argument in the terms of those who advance it -- using race "in order to get beyond racism." Regents of University of California v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring). Suddenly Justice Jackson's admonition in Korematsu almost 40 years ago is no longer merely prophetic: an urgent need has been pressed and those intent on finding a quick fix, rather than a lasting solution, have reached for the loaded weapon -- the so-called remedial use of racial discrimination.

The analytical flaw in this approach was laid bare by Professor Alexander Bickel in his extraordinary book The Morality of Consent. In precise terms, he responded to such reasoning in the following manner:

> The lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society. Now this is to be unlearned and we are told that this is not a matter of fundamental principle but only a matter of whose ox is gored. . . . Having found support in the Constitution for equality, [proponents of racial preferences] now claim support for inequality under the same Constitution. [at p. 133]

Nor did Professor Bickel stop there. "The history of the racial quota," he admonished, "is a history of subjugation, not beneficence. . . . [The] quota is a divider of society, a creator of castes, and it is all the worse for its racial base, especially in a society desperately striving for an equality that will make race irrelevant." Id.

Another champion of equal opportunity and individual liberty, Justice William O. Douglas, was no less adamant in his rejection of race-conscious solutions. In 1974, in connection with the first case to come before the Supreme Court involving the allegedly benign use of race to allocate to minorities a certain number of places in a professional school, Justice Douglas stated:

> A DeFunis [and, one might add, a Bakke or a Weber] who is white is entitled to no advantage by reason of that fact; nor is he subject to any disability, no matter what his race or color. . . .
>
> . . . .

> . . . The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized. . . .
>
> . . . So far as race is concerned, any state-sponsored preference to one race over another . . . is in my view "invidious" and violative of the Equal Protection Clause. 1/

Nonetheless, the lesson of history was ignored, and the use of race as a criterion for governmental classification once again became commonplace during the decade of the 1970's. In the area of public education, the predominant court-ordered relief for denials of the right upheld in Brown -- that is, the right to "admission to public schools on a [racially] nondiscriminatory basis" -- became mandatory race-conscious student assignments, often entailing long, involuntary bus rides to schools far from the student's home. See, e.g., Swann v. Charlotte-Mecklenberg Board of Education, 402 U.S. 1 (1971). Racial balance -- rather than racial neutrality -- became the overriding concern in school desegregation decrees, and the Supreme Court's acknowledgement in Swann that mandatory student transportation was one available desegregation technique evolved into nothing short of a judicial obsession with the "yellow school bus."

Rather than achieving racial balance, however, this preoccupation with mandatory busing has generally produced

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1/ DeFunis v. Odegaard, 416 U.S. 312, 33, 342, 343-44 (1974) (Douglas, J., dissenting) (emphasis added).

racial isolation on a broader scale. In case after case, economically able parents have refused to permit their children to travel unnecessary distances to attend public schools, choosing instead to enroll them in private schools or to move beyond the reach of the desegregation decree. Justice Powell has commented on this phenomenon in the following terms:

> This pursuit of racial balance at any cost . . . is without constitutional or social justification. Out of zeal to remedy one evil, courts may encourage or set the stage for other evils. By acting against one-race schools, courts may produce one-race school systems. 2/

After more than a decade of court-ordered busing, the evidence is overwhelming that the effort to desegregate through wholesale reliance on race-conscious student assignment plans has failed. The destruction to public education wrought by mandatory busing is evident in city after city: Boston, Cleveland, Detroit, Wilmington, Memphis, Denver, and Los Angeles are but a few of the larger and thus more celebrated examples. Nor is it difficult to understand why. The flight from urban public schools contributes to the erosion of the municipal tax base which in turn has a direct bearing on the growing inability of many school systems to provide a quality

2/ Estes v. Metropolitan Branches of the Dallas N.A.A.C.P., 444 U.S. 437, 450 (1980) (Powell, J., joined by Stewart and Rehnquist, J. J., dissenting from dismissal of certiorari as improvidently granted).

public education to their students -- whether black or white. Similarly, the loss of parental support and involvement -- which often comes with the abandonment of a neighborhood school policy -- has robbed many public school systems of a critical component of successful educational programs. As a consequence, the promise of Brown v. Board of Education remains unfulfilled.

In the fields of employment and college admissions, a parallel "pursuit of racial balance" in the 1970's proceeded under the banner of "affirmative action." The principle that a race-based employment or admissions preference is permissible only when necessary to place an individual victim of proven discrimination in the position he would have attained but for the discrimination was discarded. Proponents of the new concept of "affirmative action" focused their sights far more broadly. Preferential treatment was sought not simply for those persons who had in fact been injured, but for entire groups of individuals, based only on race or sex.

Quotas, set-asides and other race-conscious affirmative action techniques gained increasing acceptance among federal bureaucrats and judges, and by the end of the 1970's, racial considerations influenced, indeed controlled, employment decisions of every kind, from hirings to lay-offs. It seemed to matter not that those preferred solely because of race had never been wronged by the employer, or that the preferential treatment afforded them was at the expense of other employees who were

themselves innocent of any discrimination or other wrongdoing. The preoccupation was on removing from the work force any racial imbalance among employees in a discrete job unit, no matter how large or small. Lost in the scramble for strictly numerical solutions was the fundamental principle that "no discrimination based on race is benign, . . . no action disadvantaging a person because of color is affirmative." 3/

The use of race in the distribution of limited economic and educational resources in the past decade has regrettably led to the creation of a kind of racial spoils system in America, fostering competition not only among individual members of contending groups, but among the groups themselves. As commentator George Will aptly put it, this sort of allocation of opportunity has operated "to divide the majestic national river into little racial and ethnic creeks," making the United States "less a Nation than an angry menagerie of factions scrambling for preference . . . ."

Where do we go from here? Do we continue to press for the legitimizing of race as a decision-making criterion? Are individual rights going to be sacrificed on the altar of group entitlements? Is a white firefighter in Boston with ten years seniority to be laid off in favor of a recently hired black employee without any seniority simply to preserve the racial

3/ United Steelworkers of America, AFL-CIO v. Weber, 443 U.S. 193, 254 (1979) (Rehnquist, J., dissenting).

balance in the workforce? Are black policemen in New Orleans to be promoted on a one-for-one basis with white officers until the force reaches a 50-50 racial balance? What about Hispanics, women and other non-preferred officers, who have equally legitimate claims for advancement or promotion? Is Jack Greenberg, Director-Counsel of the Legal Defense Fund and acknowledged to be one of the foremost civil rights lawyers of our time, to be denied the opportunity to teach a civil rights course at Harvard or Stanford simply because he happens to be white? Is our electoral process to become so racially polarized that the ugly images from Chicago become commonplace in cities across this country, and the color of a candidate's skin comes to matter more than his stand on the issues?

I, for one, desperately hope not. But, the more insistent Government is on the use of racial preferences -- whether in the form of quotas, goals or any other numerical formula -- to correct what is perceived as an "imbalance" in our schools, our neighborhoods, our jobs or our elected bodies, the more racially polarized society becomes. Rather than moving in the direction of color-blindness, such a selection process accentuates color consciousness. It encourages us to stereotype our fellow human beings. It invites us to view people as possessors of racial characteristics, not as the unique individuals they are. It asks us to think of all blacks as "disadvantaged" or all whites as "privileged," assumptions that, more often than not, fail to withstand individual scrutiny. It submerges the vitality of personality under the deadening prejudgments of race. The very

purpose intended to be served is defeated, for race-based preferences cut against the grain of equal opportunity. And, while we are told repeatedly that this is temporarily necessary in the interest of achieving "equal results," I would remind you all that the very same justification (i.e., achieving "equal results") sustained for over half a century the separate-but-equal doctrine, which likewise looked to membership in a particular race as an accepted basis for according individuals different treatment.

That thought is a sobering one, and counsels strongly for a return to the fundamental principle of nondiscrimination in racial matters that is embodied in our Constitution and codified in our civil rights statutes. In the broadest sense, color-consciousness and racial polarization pose the greatest threat to members of minority groups because it is they who are, by definition, outnumbered. In the individual sense, however, members of all racial groups suffer, because an individual's energy, ability, enthusiasm, dedication and effort can take him no farther than permitted by his group's allotment or quota. What began as a pursuit of equality of opportunity has thus become a forfeiture of opportunity in absolute terms: individual opportunity is diminished in order to achieve group equality, measured in terms of proportional representation and proportional results. As Justice Powell has stated, "[n]othing in the Constitution supports the notion that individuals may be

asked to suffer otherwise impermissible burdens in order to enhance the societal standing of their ethnic groups." University of California Regents v. Bakke, 438 U.S. at 298 (opinion of Powell, J.).

It must be remembered that we are all -- each of us -- a minority in this country: a minority of one. Our rights derive from the uniquely American belief in the primacy of the individual. And in no instance should an individual's rights rise any higher or fall any lower than the rights of others because of race. Whatever group membership one inherits, it carries with it no entitlement to preferential treatment over those not similarly endowed with the same immutable characteristics. Any compromise of this principle is discrimination, plain and simple, and such behavior is no more tolerable when employed remedially, in the name of "affirmative action," to bestow a gratuitous advantage on members of a particular group than when it is divorced from such beneficence and for the most pernicious of reasons works to one's disadvantage.

The policy of this Administration is firmly grounded on this principle. Where unlawful discrimination exists, the civil rights laws are being enforced to their maximum extent, both to bring such behavior to an abrupt halt and to ensure that every person harmed by such conduct is made whole. Every worker who was not hired or promoted because of race will be restored to his or her rightful place. Every child whose education opportunity

has been compromised because of race will have that opportunity restored. But we will continue to challenge -- just as quickly and just as forcefully -- the remedies of overreaction. Racial quotas in the workforce or the school room will not be sought, nor will they be accepted.

At the same time, we fully recognize the significant benefits our citizens obtain from attending a culturally diverse school and laboring in a multi-racial workforce. To recognize the legitimacy of these benefits, however, is not to justify or support racial preferences in hiring, firing and promotion, nor to tolerate school assignments by race to achieve racial percentages.

Rather, the only sensible policy course is to expand recruitment, to reach out and include those minorities who were previously excluded, and then to judge all applicants on their individual merit, without discrimination. In education, the policy should be to expand educational opportunities with special magnet schools and other devices and then to allow all children to attend these or other schools regardless of race or residence. With this approach the cruel injustice of racial discrimination will be cured, not by imposing burdens on innocent individuals because of color, but by reaching out to all individuals and extending to them an enhanced measure of opportunity and consideration based on merit.

Professor William Van Alstyne put it well in his Chicago Law Review article "Rites of Passage: Race, the Supreme Court,

and the Constitution" (46 Chi. L. Rev. 775), and I can do no better than to leave you with his concluding statement as what I regard as the most fitting response to the question I have posed:

> . . . one gets beyond racism by getting beyond it now: by a complete, resolute, and credible commitment never to tolerate in one's own life -- or in the life or practices of one's government -- the differential treatment of other human beings by race. Indeed, that is the great lesson for government itself to teach: in all we do in life, whatever we do in life, to treat any person less well than another or to favor any more than another for being black or white or brown or red, is wrong. Let that be our fundamental law and we shall have a Constitution universally worth expounding.

Thank you.